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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE EZEQUIEL CORTEZ,

Defendant and Appellant.

2d Crim. No. B301016
(Super. Ct. No. 2004045000)
(Ventura County)

Joe Ezequiel Cortez is serving a 33-years-plus-life without possibility of parole state prison sentence for the special circumstances, first degree murder of Karl Wenrich. He appeals a postconviction order denying his petition and supplemental petition for resentencing. (Pen. Code, § 1170.95, subd. (a).)¹ The trial court found that appellant failed to make a prima facie showing for relief. We affirm. (§ 1170.95, subd. (c).)

¹ All statutory references are to the Penal Code unless otherwise stated.

Procedural History

In 2006, a jury convicted appellant of first degree, special circumstances murder (§§ 187, subd. (a), 189), first degree residential burglary (§ 459), attempted first degree robbery (§ 211), possession of a firearm by a felon (§ 12021, subd. (a)), unlawful possession of ammunition (§ 12316, subd. (b)(1)), and possession for sale of a controlled substance (Health & Saf. Code, § 11351). The jury returned true findings on three special circumstances allegations: the murder was committed during the commission or attempted commission of a burglary (§ 190.2, subd. (a)(17)(G)); the murder was committed during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)); and the murder was committed while appellant was an active participant in a gang (§ 190.2, subd. (a)(22)). The jury also found that a principal discharged a firearm causing death, that the offenses were committed for the benefit of a criminal street gang, and that appellant was personally armed with a firearm (§ 12022, subd. (c)), and possessed 14.25 grams or more of a controlled substance (Health & Saf. Code, § 11352.5, subd. (1)).

Killing During a Home Invasion Robbery

We affirmed the conviction in a 2008 nonpublished opinion (*People v. Cortez* (Jan. 16, 2008, B190878)) which contains the following summary of facts: In 2003, appellant went to a drug dealer's (Wenrich) house to buy heroin. Over Wenrich's objection, appellant let fellow gang members Ernesto Madrid and Ernesto Hall into the house. Wenrich was bound with duct tape, the house was ransacked for drugs and money, and Wenrich was shot twice in the head and once in the chest and hip. Wenrich called 911 and told the police that appellant shot him. Appellant was arrested hours later, wearing sneakers that matched the

bloody shoe prints in Wenrich's house. Inside appellant's house, the police found a bag of syringes to inject heroin, a pipe and marijuana, a loaded nine millimeter handgun, bullets, \$2,231 cash, gang photos of appellant and Madrid, the duct tape used to tie-up Wenrich, a stash of heroin packaged for sale hidden in a box in the back yard, and shoes and clothing used in the robbery. Wenrich's blood was on a pair of shoes in appellant's car trunk.

Petition for Resentencing

In 2019, appellant filed a petition and supplemental petition pursuant to section 1170.95 alleging that he was not the actual killer, that he did not intend to kill the victim, and he was not a major participant in the burglary/robbery or act with reckless indifference to human life during the course of the burglary/robbery. Appellant's cohort, Ernesto Hall, submitted a declaration stating that Hall bound Wenrich's legs, shot Wenrich in the face, and that Wenrich was shot three or four more times during a struggle. Hall claimed that appellant left on his bike after appellant let Hall into the house.

The trial court appointed counsel for appellant and denied the petition on the ground that no showing was made that appellant was entitled to relief. In a written order, the trial court stated "[t]here was substantial evidence presented at trial to support [the] conclusion that [appellant] did aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree; and even more[] so, that he was a major participant in the felony and did act with reckless indifferent to human life during the course of the crime."

Senate Bill No. 1437

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which became effective on January 1, 2019, revised

the felony-murder rule in California “to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, *or was not a major participant in the underlying felony who acted with reckless indifference to human life.*” (Stats. 2018, ch. 1015, § 1, subd. (f), italics added.) The bill “amends sections 188, which defines malice, and 189, which defines the degrees of murder to address felony-murder liability, and it adds section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions. [Citation.]” (*People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417 (*Gutierrez-Salazar*).)

Section 1170.95, subdivision (c) provides that when a defendant convicted of felony-murder files a petition for resentencing, the superior court “shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” The petition must meet the following conditions: “(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] [And] (3) *The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.*” (§ 1170.95, subd. (a), italics added; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 [Senate Bill 1437 is designed to ensure that murder liability is not imposed on a person who is not the

actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life].)

Section 1170.95, subdivision (b)(1)(A) requires that appellant submit a supporting declaration stating how and why he is eligible for resentencing. Here, the petition is a check-the-box form and has no supporting declaration by appellant, but does list “additional facts” and states that appellant believes he “could not now be convicted of 1st degree felony murder [due to] changes [in] Penal Code § 189.”² The supplemental petition, which is verified by appellant’s court appointed attorney, consists of hearsay and legal argument unsupported by evidentiary citation.³ At issue is the third qualifying prong (§ 1170.95, subd. (a)) which requires a prima facie showing that appellant could not be convicted of first degree murder because of recent statutory changes to sections 188 and 189.

² Appellant claims he is not bound by the record of conviction and the trial court erred in not granting an evidentiary hearing. Appellant, however, made no offer of proof what that evidence would be and requested that the trial court consider evidentiary matters rejected in prior habeas petitions: a superior court habeas petition (Ventura County Sup. Court, case no, 2004045000) and four habeas petitions filed with this court. (B202521, B207384, B210405, and B245076.)

³ Counsel’s declaration states that appellant considered Wenrich a close friend, that appellant did not intend to aid or abet the burglary/robbery, that appellant was not a major participant in the crimes, that appellant did not want Wenrich killed, that appellant did not conspire to victimize Wenrich, and that the record of conviction is “misleading” because appellant “never had visitation by his appointed counsel” and was “the victim of ineffective assistance of counsel.”

Here, the jury found the murder was committed during the commission of a burglary (§ 190.2, subd. (a)(17)(G)) and robbery or attempted robbery (190.2, subd. (a)(17)(A)). Although appellant was not the actual killer, the trial court cited a litany of factors that render appellant ineligible for resentencing: Appellant's cell phone was used to communicate with Hall and Madrid before their entry into Wenrich's home; appellant searched the house for money and drugs after Madrid duct-taped Wenrich; Madrid threatened to torture Wenrich if he did not say where the money was hidden; finding money and drugs, Madrid and appellant dragged Wenrich into the hallway and demanded that he say where additional money was hidden; after ransacking the house, Madrid said "Let's just off the motherfucker"; appellant told Madrid to turn up the volume on the stereo and Madrid shot Wenrich multiple times; Wenrich not only identified appellant as one of the robbers but appellant's shoes matched the bloody footprints in Wenrich's house; and Wenrich's blood was on the shoes and clothes found in appellant's car truck. Inside appellant's house was the half roll of duct tape used to bind Wenrich's legs.

Appellant argues that the trial court erred in finding there was substantial evidence that appellant was not eligible for relief. The alleged error, if any, was harmless because the jury found, beyond a reasonable doubt, that appellant committed a felony-murder special circumstances murder. Like the defendant in *Guitierrez-Salzar, supra*, 38 Cal.App.5th at p. 419, appellant is ineligible for relief because Senate Bill No. 1437 amends section 189 to make the crime of felony murder mirror the elements of the specific circumstance felony murder (§ 190.2, subd. (a)(17)).

People v. Clark (2016) 63 Cal.4th 522 and *People v. Banks* (2015) 61 Cal.4th 788 provide guidelines in determining whether an aider and abettor was a “major participant” who acted with “reckless indifference [for] . . . life.” (*Id.* at pp. 798-804.) Those cases hold that a defendant acts with a reckless indifference to human life when he or she “knowingly creat[es] a ‘grave risk of death’ . . .” (*Id.* at p. 808.) This, however, is not a close case. Appellant not only helped stage the home invasion robbery, but assisted in the torture of Wenrich to find money and drugs. When Madrid said “Let’s just off the motherfucker,” appellant told him to turn the music up to mask the sound of the gun shots.

A “[d]efendant’s claim that the evidence presented against him failed to support [a] robbery-murder special circumstance [finding made prior to *Banks* and *Clark*] . . . is not a ‘routine’ claim of insufficient evidence . . .” (*In re Miller* (2017) 14 Cal.App.5th 960, 979-980.) Appellant’s petition for resentencing “does not require resolution of disputed facts; the facts are a given . . .” (*Id.* at p. 980; see *Gutierrez-Salazar*, *supra*, 38 Cal.App.5th at pp. 419-420 [defendant not eligible for relief under Senate Bill No. 1437 where the jury found true special circumstance allegation that murder was committed during commission of a robbery]; *People v. Gonzalez* (2018) 5 Cal.5th 186, 202 [felony-murder special-circumstance instructions required jury to find aider and abettor intended to kill or was a major participant and acted with reckless indifference to human life].)

Disposition

The judgment (order denying section 1170.95 petition for resentencing) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Ben Coats, Judge
Superior Court County of Ventura

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